(30,198)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 327

ALPHA PORTLAND CEMENT COMPANY, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF MASSACHUSETTS

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 26, 1924

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[fol. a] **IN SUPREME JUDICIAL COURT OF MASSACHUSETTS**

JUDGE'S CERTIFICATE TO CLERK

I, Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts, do certify that John F. Cronin, Esquire, whose signature is affixed to the paper hereto annexed, is Clerk of said Court, holden at Boston, in and for the County of Suffolk, in said Commonwealth, and hath the keeping of all the ancient files, records, and proceedings of said Court throughout the Commonwealth, down to the first day of August A. D. 1797, as well as of the files, records, and proceedings of said Court holden as aforesaid, for said County of Suffolk, subsequent to that time; and is, by law, the proper person to make out and to certify copies of all the records and proceedings of the said Supreme Judicial Court previous to the said first day of August A. D. 1797, as well as of all records and proceedings of the said Court, holden as aforesaid, for the said County of Suffolk, subsequent to that time; and that full faith and credit is and ought to be given to his acts and attestations, done as aforesaid, and that his attestation to the paper hereunto annexed is in due form.

In testimony whereof, I have here unto set my hand, and caused the seal of said Court to be hereunto affixed, this fourteenth day of March in the year one thousand nine hundred and twenty-four.

Arthur P. Rugg. (Seal.)

[fol. 1] UNITED STATES OF AMERICA, ss:

IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

WRIT OF ERROR AND RETURN—Filed March 12, 1924

[Seal of the United States District Court, Massachusetts.]

The President of the United States to the Honorable the Justices of the Supreme Judicial Court of the Commonwealth of Massachusetts, holden at Boston, within and for the County of Suffolk, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Judicial Court before you, or some of you, being the highest court of law or equity of the Commonwealth of Massachusetts in which a decision could be had in the said suit between Alpha Portland Cement Company, a corporation duly organized and existing under the laws of the State of New Jersey, Plaintiff, and Commonwealth of Massachu-

setts, Defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Alpha Portland Cement Company,
as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, the twelfth day of March, in the year of our Lord one thousand nine hundred and twenty-four.

James S. Allen, Clerk of the District Court of the United States, District of Massachusetts.

March 12, 1924.

Allowed by Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts.

[fol. 2] COMMONWEALTH OF MASSACHUSETTS, ss:

And now here the Judges of the Supreme Judicial Court make return of this writ by annexing hereto and sending herewith, under the seal of the said Supreme Judicial Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John F. Cronin, Clerk of said Supreme Judicial Court, have hereto set my hand and the seal of said court this fourteenth day of March, A. D. 1924.

John F. Cronin, Clerk. (Seal.)

[File endorsement omitted.]

[fol. 3] SUFFOLK, ss:

IN SUPREME JUDICIAL COURT

In Equity

ALPHA PORTLAND CEMENT COMPANY

vs.

COMMONWEALTH OF MASSACHUSETTS

PETITION

To the Honorable the Justices of the Supreme Judicial Court of Massachusetts, sitting in equity, within and for the County of Suffolk:

Respectfully represents your petitioner, Alpha Cement Company, as follows:

1. Your petitioner is a foreign corporation organized and existing under and by virtue of the Laws of the State of New Jersey, and is and was at all the times hereinafter mentioned engaged extensively in interstate commerce throughout the United States, and maintains in the City of Boston, County of Suffolk, in the Commonwealth of Massachusetts, a sales office used exclusively for conducting interstate commerce, and for no other purpose.

2. The activities of your petitioner within the Commonwealth of Massachusetts are exclusively confined to the solicitation by salesmen engaged by petitioner of orders from customers resident therein and neighboring states, and the transmission of the said orders by mail to the home office of your petitioner, located in the City of [fol. 4] Easton, in the Commonwealth of Pennsylvania, where the said orders are accepted or rejected. Your petitioner entered the Commonwealth of Massachusetts for the sole purpose of transacting interstate commerce, and has always strictly confined its operations within the said Commonwealth of Massachusetts to the solicitation of orders as aforesaid, and to the execution of said orders when they have been accepted, which acceptance takes place outside of the Commonwealth of Massachusetts as aforesaid, and the shipment of merchandise called for thereby from other states, where goods sold are manufactured, produced or stored by your petitioner, into the

Commonwealth of Massachusetts or neighboring states, where the purchaser resides, the said point of delivery in every case, however, being different from the state where such transportation begins.

3. The business of your petitioner consists of the manufacture and sale of cement. The sales office maintained by your petitioner within the Commonwealth of Massachusetts is in charge of a District Sales Manager, who himself solicits orders at the places of business of prospective customers, the only other employee in the said office being a clerk. In addition to the District Sales Manager your petitioner employes three salesmen who solicit orders in the Commonwealth of Massachusetts and in other states of New England, for cement packed in sacks, bags or barrels. The orders taken by said salesmen are turned in at said sales office and forwarded to the home office of your petitioner at Easton, Pa., where they are accepted or rejected. If the said orders are accepted the merchandise is shipped from the Company's mills located at Martins Creek, Pa. or Alsen, N. Y. direct to the consumer. Invoices for merchandise so shipped are sent from the principal office at Easton, Pa. direct to the consumer, and contain a direction that funds in payment therefor be sent direct to your petitioner's home office at Easton, Pa. In substantially all cases, funds in payment of said merchandise are sent directly by the customer to the said home office of your petitioner at Easton, Pa., a very large majority of the payments being discounted and paid within ten days. Your petitioner keeps no merchandise in its sales office located in the City of Boston, or anywhere in Massachusetts, in sample form or otherwise. Your petitioner keeps no bank account in Massachusetts, the office rent and salesmen's salaries being paid direct from your petitioner's office at Easton, Pa. Incidental expenses are paid from an impress account of not exceeding one thousand ($1,000.00) kept by your petitioner's District Sales Man-
[fol. 5] ager in his own name. Your petitioner keeps no books of record in Massachusetts, nor is any of your petitioner's property located in Massachusetts, other than a few hundred dollars' worth of office furniture located in the said office. Your petitioner ships no merchandise from one point in Massachusetts to another point in that state, nor from the Commonwealth of Massachusetts to any other state or country. None of your petitioner's stockholders' or directors' meetings are held in Massachusetts, and no officer or agent of your petitioner has any office in Massachusetts except the District Sales Manager mentioned.

4. Your petitioner has on several occasions advised the Department of Corporations and Taxation of the Commonwealth of Massachusetts of the details of its activities carried on within the said Commonwealth of Massachusetts, and has steadily and repeatedly claimed that its said activities were purely interstate in character, and that your petitioner could not legally be required to pay any excise or tax to the Commonwealth of Massachusetts. Notwithstanding such information so supplied to the Department of Corporations and Taxation, and your petitioner's contention in respect thereto, the Com-

missioner of Corporations and Taxation of the Commonwealth of Massachusetts decided that your petitioner was subject to the Excise Tax Law of the Commonwealth of Massachusetts, and demanded that your petitioner prepare and file a return, as provided by the Foreign Corporations Excise Tax Act of the Commonwealth of Massachusetts, and that upon your petitioner's failure to do so, severe penalties would be assessed against it. That in compliance with the said demand and not as its voluntary act, your petitioner on the 6th day of May, 1922 made and delivered under protest to the Department of Corporations and Taxation of the Commonwealth of Massachusetts, a report in writing for the year 1922 in the form prescribed by the said Commissioner of Corporations and Taxation, for the purpose of supplying the said Commissioner with the information demanded by him for the purpose of assessing the excise tax claimed by the said Commissioner to be due under the provisions of Chapter 63 of the General Laws as amended. A copy of said return and of the protest accompanying the same is hereunto annexed and marked Exhibit "A."

5. That thereafter and on or about the 20th day of September, 1922, the said Department of Corporations and Taxation of the Commonwealth of Massachusetts, made and settled an account against [fol. 6] your petitioner for taxes based upon the information contained in said return, Exhibit A hereto annexed, and claimed to be due from your petitioner for the year 1922, under the provisions of Chapter 63 of the General Laws and acts of amendment thereof and in addition thereto, and in accordance with Chapters 361 and 493 of the Acts of 1921, for the sum of five hundred sixty-seven & 57/100 ($567.57) dollars, and rendered such account and notice thereof to your petitioner; a copy of said account is hereunto annexed and marked Exhibit "B."

6. Thereafter and on the 26th day of September, 1922, in a letter to your petitioner's attorneys, Messrs. Porter & Taylor, the said Department of Corporations and Taxation of the Commonwealth of Massachusetts stated the basis upon which the said assessment had been made. A copy of said letter is hereunto annexed and marked Exhibit "C."

7. That in computing the amount of said tax measured by $5.00 a thousand upon the value of the corporate excess, the said Department of Corporations and Taxation determined the value of the corporate excess of your petitioner in the following manner, to wit: To the value of the property in Massachusetts shown on said report of your petitioner, and amounting to five hundred and seventy-three ($573.00) dollars, the said Department of Corporations and Taxation added a sum equal to that percentage of the total intangible assets of your petitioner, that the amount of income determined by the said Department of Corporations and Taxation as attributable to Massachusetts bore to your petitioner's total net income, and thus determined the total value of the assets of your petitioner in Massa-

chusetts to be ninety-nine thousand four hundred ($99,400.00) dollars, as shown in the letter from the said Department of Corporations and Taxation above referred to—Exhibit "C." Said sum of ninety-*four* thousand four hundred ($99,400.00) dollars was arrived at by said Department not as a valuation of said tangible property of the petitioner subject to taxation within the Commonwealth, but as a valuation of all the assets of the petitioner allocated by said Department as employed in any business within the Commonwealth, which assets consisted solely, except for said tangible assets amounting in value to five hundred and seventy-three ($573.00) dollars, of notes, bills and accounts receivable, the proceeds of sales made in the course of interstate commerce carried on by the petitioner solely as hereinbefore set forth. In determining the percentage of the total net income of the corporation to be attributed to the Commonwealth of [fol. 7] Massachusetts under the statutes aforesaid, the said Department of Corporations and Taxation held that the capital stock of the Alpha Portland Cement Company of Pennsylvania, amounting in value to four million five hundred thousand ($4,500,000.00) dollars, should be considered as an intangible and not a tangible asset of your petitioner, and that in determining the ratio that the five hundred and seventy-three ($573.00) dollars of office furniture bore to the total tangible assets of your petitioner, the said item of four million five hundred thousand ($4,500,000.00) dollars should not be considered as a tangible asset. In determining the percentage of the total net income of your petitioner to be allocated as attributable to business in Massachusetts, the Department of Corporations and Taxation took the proportion that the salaries paid to the four salesmen reporting to the Massachusetts office bore to the total salaries of all employees, and overruled your petitioner's contention that if this portion of the statutory basis of valuation were to be observed at all, it should be that proportion of the salaries that the time employed in soliciting business in Massachusetts bore to the total time of said salesmen, and that the salaries paid to the salesmen for selling goods in interstate commerce in other states than Massachusetts could have no legal relation to the business done by your petitioner in Massachusetts.

8. Thereafter and on or about the 23rd day of June, 1923, your petitioner paid the said sum of five hundred sixty-seven & 57/100 ($567.57) dollars, with interest thereon, amounting to a total of five hundred ninety & 54/100 ($590.54) dollars to the Commonwealth of Massachusetts, and received a receipt for the same. Your petitioner made the said payment under protest, alleging that the said tax was illegal and was not rightfully due from your petitioner.

9. The said tax assessed against your petitioner and paid under protest is illegal and void for the following reasons:

(a) The method of assessing said tax, as described above in paragraph "7th" hereof, is not in conformity with the proper construction of said statute.

(b) The imposition of the said tax against your petitioner is in violation of the Constitution of the United States, in that your petitioner is denied the rights and privileges assured to it therein, and in that the said tax so assessed against your petitioner is a direct burden on interstate commerce and constitutes an unlawful regulation of interstate commerce in contravention of the commerce laws embodied in Article 8 of Section 1 of the Constitution of the United States.

[fol. 8] (c) That the said tax so assessed against your petitioner by the Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts is in violation of the Federal Constitution, in that it levies a tax upon property of your petitioner situated without the limits of the Commonwealth of Massachusetts, thereby depriving your petitioner of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

(d) Your petitioner draws in question the validity of said Chapter 63 of the General Laws, and Chapters 361 and 493 of the Acts of 1921 and acts in amendment thereof. on the ground that said statutes are repugnant to the Constitution of the United States, in that they levy a tax which is a direct burden on interstate commerce, and constitutes an unlawful regulation of interstate commerce in contravention of the commerce clause embodied in Section 8 of Article 1 of the Constitution of the United States.

(e) Your petitioner draws in question the validity of said Chapter 63 of the General Laws and Chapters 361 and 493 of the Acts of 1921 and acts in amendment thereof, on the ground that said statutes are repugnant to the Constitution of the United States, in that they levy a tax against property of your petitioner situated without the limits of the Commonwealth of Massachusetts, thereby depriving your petitioner of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

10. Wherefore your petitioner brings this petition against the Commonwealth of Massachusetts, the respondent herein, pursuant to the provisions of Section 77 of Chapter 63 of the General Laws, and prays that the aforesaid tax amounting with interest to five hundred ninety & 54/100 ($590.54) dollars,—paid to the Commonwealth of Massachusetts by your petitioner may be adjudged to have been illegally assessed, and that the amount thereof may be returned to your petitioner by said Commonwealth of Massachusetts, with interest from the date of payment, and for such other and further relief as to this Court may seem just.

Dated, Easton, Pa., July 9, 1923.

Alpha Portland Cement Company, by Jno. J. Matthes, Treasurer.

Filed July 11, 1923.

[fol. 9] Jurat showing the foregoing was duly sworn to by John J. Matthes omitted in printing.

[fol. 10] EXHIBIT "A" TO PETITION

Form 355B. 1922

The Commonwealth of Massachusetts

Department of Corporations and Taxation No. —

Foreign Business Corporation Excise Tax Return

General Laws, Chapter 63

To be Filed within the First Ten Days of April, 1922, with the Commissioner of Corporations and Taxation, Division of Corporations, 237 State House, Boston

Received	Assessed	
Verification	Audited by	
Penalty	(Do not write above this line) Read Instruction Sheet	

Statement of (Name of corporation) Alpha Portland Cement Company, (Kind of business, specify in detail) Manufacture & Sale of Portland Cement, Post office address, Easton, Pa.

Location of principal office: (Street and street number) First National Bank Bldg., (City or Town) Easton, (State) Penna. Name of Treasurer: Jno. J. Matthes. Location of Massachusetts office: (Street and street number) Board of Trade Bldg., (City or Town) Boston.

Return of Income for the Calendar year ending December 31, 1921.

Schedule A.—Taxable Net Income as Reported in Last Federal Return Due Prior to April 1, 1922

Gross Income

1. Gross sales, less returns and allowances	$8,584,177 96		
2. Less cost of goods sold, exclusive of items called for separately below	4,181,661 88	$4,402,516 08	
3. Gross income from operations other than trading or manufacturing, less allowances		0	
4. Taxable interest on Liberty Bonds, etc		22,581 18	
5. Taxable interest from all other sources		7,919 01	
6. Rents		6,709 21	
7. Royalties		0	
8. Share of net income earned by personal service corporation (Whether received or not)		0	
9. Dividends on stock of foreign and domestic corporations		0	
10. Gross income from all other sources (Not including any amount reported in Item 23, below)		0	
11. Total of Items 1 to 10			$4,439,725 48

[fol. 11] Deductions

12. Expenses (except amounts reported in Item 2 above, or called for separately below)	$2,266,937 87		
13. Compensation of officers (in whatever form paid)	116,700 08		
14. Repairs (including labor, supplies, etc.)	724,591 51		
15. Interest	377 24		
16. Taxes	114,089 02		
17. Bad debts	9,311 27		
18. Exhaustion, wear and tear (including obsolescence)	453,788 02		
19. Depletion	23,771 31		
20. Amortization of war facilities			
21. Total of Items 12 to 20			$3,709,566 32
22. Item 11 Minus Item 21			$730,159 16
23. Profit or loss on sales of capital assets and miscellaneous investments	$ 0		
24. Losses by fire, storm, etc. (Extend difference between or sum of Items 23 and 24)	0		0
25. Net income exclusive of deductions for dividends (Item 22 minus 24, extended)			$730,159 16
26. Dividends deductible under Section 234 (a) 6 of the Revenue Act of 1921			0
27. Net Income (Item 25 minus Item 26)			$730,159 16

Schedule B.—Verification or Correction of Schedule A

(a) Since filing the Federal Return have any errors or inaccuracies in Items 1 to 27 inclusive been discovered? Ans. No.

(b) If so, state in detail upon a memorandum hereto annexed what corrections should be made.

(c) Has the Corporation received notice that the assessment made by the Federal Government is based upon a net income greater or less than is reported in Schedule A? Ans. No.

(d) If so, state upon a memorandum hereto annexed the amount of net income as computed by the Federal Government upon the latest determination by it of the proper tax, setting forth the facts giving rise to the difference.

Has the corporation received notification of any change in the amount of net income as determined by the Federal Government with respect to any previous year, return of which was required to be made under the laws of this Commonwealth? Ans. No.

If so, state for what year or years. ——.

Has the change been previously reported? Ans. ——.

Schedule C.—Corporate Excess

Table I.—Capital Stock

	Amount authorized	Amount issued and outstanding Apr. 1, 1922	Amount paid in thereon Apr. 1, 1922 (if installment stock)	Number of shares issued Apr. 1, 1922	Par value per share	Market value per share
Common.....	$23,000,000 00	$15,800,000 00	.....	158,000	$100 00	Not known.
1s Pref.	2,000,000 00	2,000,000 00	.....	20,000	100 00	Not known.
2d Pref.	.....	.....	.....	.....	.....	.....

[fol. 12] If stock is listed on Stock Exchange give name of Exchange. Not Listed.

If stock is not listed on Stock Exchange, state last four sales, giving the information called for in Table II. Do not include "wash" sales.

Table II—Sales of Stock

	Date of sale	Number of shares	Price per share	Public or private sale
Com.	All transfer of Alpha Stock transaction between individual stockholders consideration not known.			
Com.				
Com.				
Com.				
Com.				
1st Pref.				
1st Pref.				
1st Pref.				
1st Pref.				
2nd Pref.				
2nd Pref.				
2nd Pref.				
2nd Pref.				

Supplementary Statement

Table III—Net Earnings Last Five Years

Year ended	Net income (deficit) in Red)	Deductions	Additions	Net earnings (after taxes)	Number of shares	Dividends declared		
						Common	First preferred	Second preferred
1917	$559,313 30	$90,540 58	$1,475 81	$470,248 53	100,000	3 %	7%	..%
1918	489,007 35	220,700 76	116,998 82	385,305 41	100,000	3 %	7%	..%
1919	935,778 40	128,074 17	130,464 47	938,168 70	100,000	3 %	7%	..%
1920	1,268,541 51	341,266 09	34,410 62	961,686 04	100,000	6 %	7%	..%
1921	677,872 92	121,064 73	115,530 20	672,338 39	158,000	4½%	7%	..%
Total	.....	.....	.....	$3,427,747 07	.....	19½%	35%	....
Average...	.....	.....	.....	$685,549 41	.....	3.9%	7%	..%

[fol. 13]

Table IV.—Assets and Liabilities, April 1, 1922

Assets	Books of account	Value (actual)	Liabilities (Actual)	
Real estate	$621,848 37	.....	Capital stock	$17,800,000 00
Machinery	9,414,949 62	.....	Mortgages	0
Furniture, fixtures and tools.	29,946 68	.....	Notes payable	125,000 00
Autos, trucks and teams	60,292 21	.....	Accounts payable	781,685 77
Merchandise	3,616,971 30	.....	Other liabilities (naming items)	.....
Notes	31,803 88	.....	Wages	59,208 92
Accounts receivable	682,024 06	.....	Reserves	531,352 74
Securities	5,084,620 23	.....	Profit & loss	2,108,850 96
Cash	113,642 04	.....	.....	.....
Good Will	.....	.....		
Other assets (naming items).	1,750,000 00	.....	.....	.....
Total assets	$21,406,098 39	$.....	Total liabilities	$21,406,098 39

State any other facts that are material in determining "the fair cash value of all the shares constituting the capital stock."

Table A—Assets Employed in Business within Massachusetts (see Instruction Sheet)

	Value April 1, 1922
Real estate	None
Machinery	None
Merchandise	None
Other tangible property Office Furniture only	573 00
Portion of bank deposits in this and in other states employed in conduct of business within Massachusetts*	None
Portion of accounts receivable*	None
Portion of patents* $... Portion of good will* $... Total	.....
Portion of all other intangible assets employed in Massachusetts (itemize):*	.....
Total of assets employed in business within Massachusetts	$573 00

[fol. 14] Tangible Assets Employed in Business Outside Massachusetts

City or town and state	Real estate (col. 1)	Machinery (col. 2)	Merchandise (col. 3)	Other tangible prop. (col. 4)
Alpha, N. J. Martins Creek, Pa. Cementon, N. Y Jamesville, N. Y. Manheim, W. Va. Reynoldsville, W. Va. New York City Philadelphia, Pa Pittsburgh, Pa. Baltimore, Md. Chicago, Ill. Ironton, Ohio La Salle, Ill. Bellevue, Mich.	$621,848 37	$9,414,949 62	$3,616,971 30	$90,238 89
Total	$.....	$.....	$.....	$.....

Totals of Columns 1 to 4

1.	.....
2.	.....
3.	13,744,008 18
4.	.....
	$13,744,008 18

Intangible Assets Employed Outside Massachusetts (Itemize Below)

Portion of bank deposits employed outside*	$113,642 04	
Portion of accounts receivable*	713,827 94	
Total	$827,468 98	
Portion of patents* $... Portion of good will* $1,750,000.00: Total		1,750,000 00
Portion of all other intangible assets employed outside (itemize):* $5,084,620.23		5,084,620 23
Total of all assets employed in business whether within or without Massachusetts (include totals above)		$21,406,098 39

*Follow instruction sheet as to apportionment.

[fol. 15] Table B.—Tangible Property Situated Within Massachusetts (See Instruction Sheet)

Col. 1 City or town in which corporation has office, store or factory	Col. 2 Real state value April 1, 1922. See note	Col. 3 Machinery value April 1, 1922. See note	Col. 4 Merchandise value April 1, 1922	Col. 5 Other tangible prop. value April 1. 1922. See note	Col. 6 Amount of mortgage on real estate reported in col. 2
City or Town in which Corporation has no Office, Store or Factory.	$	$	$	$	$
Totals	$	$	$	$	$

NOTE.—In column 2, include works, structures, real estate, poles, underground conduits, wires and pipes owned within the commonwealth and subject to local taxation. In column 3, include only such machinery, as is owned by the corporation within the commonwealth, and as is subject to local taxation. Other machinery owned by the corporation, if any, should be included in column 5.

Question Supplemental to Table B

Does the corporation own no tangible property in Massachusetts, except furniture and equipment reasonably necessary for the use of the clerk or other executive officers of the corporation? Answer. No tangible property except sales office furniture.

Table C.—Securities Held in Massachusetts (Include Both Taxable and Non-taxable)

Col. 1 Amount of bonds or No. of shares stock	Col. 2 Complete description of securities by name and class or issue	Col. 3 Value April 1, 1922	Leave this column vacant
	None	$.....	.....
Total		$.....	.....

Schedule D.—Allocation of Income

1. Net income as shown in Schedule A as verified or corrected by Schedule B.....		$730,159 16	
2. Interest from bonds, notes, etc., of U. S. included in Federal return	$22,581 18		
3. Gains from the sale of capital assets exclusive of those described under Item 8 below.....	.....		
4. Total of Items 2 and 3.....		$22,581 18	
5. Difference between Items 4 and 1 (enter also in outside column.....		$707,577 98	$707,577 98

Items 6 and 7 to be Answered only by Corporations Carrying on Business Solely in Mass.

6. (a) Average fair cash value of machinery owned and used in Mass.	$.....	X Item 5 =	$.....
(b) Average value of total assets employed in Mass.....	$.....		
7. Difference between Items 6 and 5 = amount taxable at 2½%.....			$.....

[fol. 16] Items 8 to 17 to be Answered Only by Corporations Carrying on Business Outside Mass.

8. Gains from the sale of tangible capital assets situated within Mass.....		None.	
9. Interest from: Mass. corporations; associations, partnerships or trusts having transferable shares and having a principal place of business in Mass.; Mass. inhabitants; excepting interest from Trust Companies and from National Banks..		None.	
10. Total of Items 8 and 9 (enter also in outside column).....		None.	$707,577 98
11. Difference between Items 10 and 5 = remainder to be allocated		.....	
12. (a) Average value of tangible property in Mass.....	$573 00	X ⅓* of Item 11 =	$8 02
(b) Average value of all tangible property.....	$16,992,355 22		
13. (a) Wages, salaries, etc., assignable to Mass.....	$11,493 38	X ⅓* of Item 11 =	1,642 29

Table C.—Securities Held in Massachusetts—Continued

	(b) Total wages, salaries, etc.	$1,650,614 73	
14.	(a) Gross receipts assignable to Mass.	$343,204 60	
	(b) Gross receipts from all business	$10,717,546 43	X ⅓* of Item 11 = 7,552 22
15.	Total of Items 10, 12, 13 and 14		$9,202 53
16.	(a) Average fair cash value of machinery owned and used in Mass. $.....		
	(b) Average value of total assets employed in Mass. $.....		X Item 15 = ...
17.	Difference between Items 16 and 15 = amount taxable at 2½%		$9,202 53
18.	(a) Total dividends paid Massachusetts inhabitants for year ending Dec. 31, 1921		$843 00
	(b) 5% of same (see instruction sheet)		$42 15

Supporting Schedules

The following schedules, where applicable, must be made in support of Schedule D, and firmly attached to this Return:

Schedule D 3 and 8: Submit a detailed schedule of capital assets sold (not stock in trade), describing same and giving location of such of said assets as are tangible.

Schedule D 12: In this schedule state the method used in determining the average values used in Items 12 (a) and (b).

Schedule D 13: In this schedule specify the location of the premises to which wages are assignable and the amount assigned to each such place, whether within or without Mass.

Schedule D 14: In this schedule state amounts of sales and receipts assigned to each place of business, whether within or without Mass.

Schedule D 6 (b) or 16 (b): Submit a schedule describing the assets and stating their value and location.

* NOTE.—If only two of above proportions apply, substitute ½. If only one of above proportions applies, substitute 1. Do not fail to observe instructions on accompanying sheet.

[fol. 17] Supplemental Statement

No part of the debts of this corporation as set forth in this return has been incurred nor has any office, warehouse or other place of business been maintained in a state other than this commonwealth for the purpose of reducing the amount of taxes to be paid by said corporation.

The corporation, during the year above reported for, rented premises outside Massachusetts at the following places, and the premises were first rented to the corporation at or about the date set after the name of each such place:

Affidavit

I, the treasurer (or other principal officer) of the above-named company, being duly sworn, make oath that I have carefully examined the foregoing return, and I further make oath to the best of my knowledge and belief, and from such information as I have been able to obtain, that the items of income as set forth in Schedule A are a true copy of such items as they were included in its last return of income due prior to April 1, 1922, and made to the Collector of Internal Revenue, that, as verified or corrected by Schedule B, said items are true and accurate statements and that all other items, statements and all schedules in this return contained, including the accompanying schedules and statements, are true and accurate in each and every particular.

Signature of treasurer or other principal officer, Jno. J. Matthes.

Title of office, as for example "Treasurer," Treasurer.

Subscribed and sworn to before me, this 6th day of May, 1922.

J. G. Taylor, Notary Public—Justice of the Peace—Special Commissioner. My commission expires Jan. 17th, 1925.

The Commonwealth of Massachusetts

Department of Corporations and Taxation

Henry F. Long, Commissioner

237 State House, Boston

March 31, 1922.

Warner, Stackpole & Bradlee, 84 State St., Boston, Mass.

DEAR SIRS: I have yours of March 30 in regard to the Alpha Portland Cement Company. No penalty will be imposed if the excise tax return of this corporation is filed on or before May 10.

Very truly yours, Alexander Holmes, Deputy Commissioner.

The annexed report on Form 355B, and schedules annexed, for the year 1922, are filed by the Alpha Portland Cement Company [fol. 18] under compulsion and protest, and only for the purpose of

avoiding the imposition of the penalties provided by the Statutes of Massachusetts; and in conformity with the demand of the Department of Corporations and Taxation of the Commonwealth of Massachusetts made in connection with the Company's 1921 report.

The Alpha Portland Cement Company has commenced an action in the Supreme Judicial Court of Massachusetts, County of Suffolk, against the Commonwealth of Massachusetts regarding the 1921 tax, and contesting the validity thereof on the grounds that the tax assessed against it for 1921 is in violation of the Constitution of the United States, and praying for the repayment of the tax paid in 1921. This case is at issue, but has not yet been reached for trial. The condition of the Alpha Portland Cement Company has not changed since the institution of that suit, and in filing this return it raises the same objections as those raised against the payment of the 1921 tax. A similar suit is also pending for the 1920 tax.

While the attached report is prepared in conformity with the ruling of the Department of Corporations and Taxation of the Commonwealth of Massachusetts, the Alpha Portland Cement Company respectfully insists that the decision of the Department requiring the filing of this return is erroneous, and the Alpha Portland Cement Company specifically stipulates that the filing of this return shall not be considered as a waiver or abandonment of its rights to contest the validity of the said ruling or of any tax or fee which may be assessed against it; but contends that the Commonwealth of Massachusetts is without power or jurisdiction to assess such a tax against it, for the reason that the business of the corporation is purely interstate in its character and comes within the protection of the commerce clause and other clauses of the Federal Constitution, as shown by the following statement of fact:

The Alpha Portland Cement Company is incorporated under the laws of New Jersey for the purpose of manufacturing and selling cement. The home office is located at Easton, Pennsylvania. The corporation leases offices located at Rooms 619 and 620, Board of Trade Building, situated at State, Broad, Central and India Streets in Boston, which is its only office in Massachusetts. This office is in charge of a district sales manager, who himself travels in other states. The only other employee therein is a clerk. The salesmen, four in number including the district sales manager, solicit orders [fol. 19] in Massachusetts and other New England states, for cement packed in sacks, bags or barrels. Such orders are turned in at the said Boston office, and are then forwarded to the home office of the Company at Easton, Pa., where they are accepted or rejected. If accepted, the merchandise is shipped from the Company's mills located at Martins Creek, Pa., or Alsen, New York, direct to the consumer. Invoices are sent from Easton, Pa., direct to the consumer, and contain directions that payment be sent direct to Easton, Pa. No merchandise is kept in the said Boston office or elsewhere in Massachusetts in sample form or otherwise. Orders are taken by direct solicitation or by mail. Payments by customers are made direct to Easton, Pa., except certain delinquent accounts, which salesmen may at times endeavor to collect. No bank account is kept in

Massachusetts. Office rent and salaries are paid from Easton, Pa. Incidentals are paid from an impress account not exceeding $1,000, kept by the district sales manager in his own name. No books of records are kept in Massachusetts. No property of any kind is in Massachusetts, except a few hundred dollars worth of office furniture. No merchandise is shipped from one point in Massachusetts to another point in that state, nor from Massachusetts to any other state or country. No corporate meetings are held in Massachusetts, and no officer or agent of the company has any office in Massachusetts, except the district sales manager above mentioned.

Explanation of Computations in the Accompanying Report

The Alpha Portland Cement Company's Federal Tax return covering the year 1921 was a consolidated return, the other company participating in it being the Alpha Portland Cement Company of Pennsylvania.

Schedule C, Table A, First Section

The only assets which the Alpha Portland Cement Company has in Massachusetts are the articles of office furniture in the Boston office above described. Its value is $573.00. All expenses of said office and the New England Salesmen's Salaries are paid from the Company's office at Easton, Pa., the only funds in Massachusetts being the said impress account in the district sales manager's name not exceeding $1,000.

[fol. 20] Question Supplemental to Table B

No tangible property is owned by the Alpha Portland Cement Company in Massachusetts, except the office furniture above described. Said Boston office is under the supervision of the district sales manager, and no officer of the corporation uses it.

Schedule D, Item 12

The average value of all the tangible property of the corporation was computed by averaging the monthly balances for the year, giving as the result $12,492,355.22. To this amount was added $4,500,000.00, the investment of the Alpha Portland Cement Company in the stock of the Alpha Portland Cement Company of Pennsylvania, a subsidiary company, through which the Alpha Portland Cement Company holds certain properties within the State of Pennsylvania. Under the laws of Pennsylvania, the Alpha Portland Cement Company, being a New Jersey corporation, is limited in its holdings of real estate in Pennsylvania, and because of this limitation title to the mills in Pennsylvania is vested in the Alpha Portland Cement Company of Pennsylvania, all of the stock of which is owned by the Alpha Portland Cement Company. The latter company operates the mills in Pennsylvania and derives all the income therefrom, the Alpha Portland Cement Company merely crediting the subsidiary

company with a nominal sum as rent to cover depreciation. Since the income from the Pennsylvania mill is included in the income in this report, the said $4,500,000.00, representing the value of the Pennsylvania mill hsould be included in the value of all the tangible property of the company, as shown in Schedule D, Item 12B. The New York Court of Appeals held that an assessment, ignoring the value of properties under these conditions, but including the inrome therefrom, was unconstitutional. People ex rel. Alpha Portland Cement Company vs. Knapp, 230 N. Y. 48. A petition to the Supreme Court of the United States for a writ of certiorari was denied. Item 12B has, therefore, been taken as $16,992,355.22.

Schedule D, Item 14

The New England salesmen cover not only the State of Massachusetts, but most of the New England States, except the salesman for the State of Connecticut, who does not travel outside of that state. [fol. 21] Salaries paid to the New England salesmen, not including the Connecticut salesman, are $18,060.00. The Alpha Portland Cement Company contends that it is not doing business in Massachusetts, and it is clear that in no event could more than that proportion of the salesmen's salaries be charged to the Massachusetts business than the percentage of the gross receipts from Massachusetts purchasers to the gross receipts from the New England sales, which amounts to $343,204.60.

Schedule D, Item 13A is, therefore $11,493.38.

Dated, May 6th, 1922.

Alpha Portland Cement Company, by Jno. J. Matthes, Treasurer.

Form 355 L, 1922 Revision

The Commonwealth of Massachusetts

Department of Corporations and Taxation

Reasons for Late Filing

To accompany business corporation excise tax return, when filed late. The mere filing of this form will not insure abatement of penalties. Penalties for late filing may be abated only when good cause is shown.

Name of Corporation: Alpha Portland Cement Co.
Post Office address: Easton, Pa.
Accompanying return due within the first ten days of April, 1922.

1. Was it impossible for the above-named corporation to file a proper return within the first ten days of April? Ans. Yes.

2. Is the accompanying return presented for filing as promptly as it was possible for the corporation to obtain the data required to fill out the return and properly prepare it for filing? Ans. Yes.

3. State below the specific reasons, if any, why it was not possible to file the return more promptly. Part of our records are kept in Chicago, and part in Easton, Pa., and Chicago books were not closed so return could be made earlier.

Affidavit

I, the undersigned, treasurer (or other principal officer) of the above-named corporation, being duly sworn, make oath that the above answers and statements are true.

(Signature of treasurer or other principal officer:) Jno. J. Matthes, Treasurer (title of office).

Subscribed and sworn to before me this 6th day of May, 1922. John G. Taylor, Notary Public. My commission expires January 17, 1925.

[fol. 22] Alpha Portland Cement Company

Statement Showing Dividends Paid to Stockholders Resident of the State of Massachusetts During the Year Ending December 31, 1921

L. S. Brown, 317 Main St., Springfield, Mass.....	$135 00
Dorothy M. Chapman, 300 Clinton Road, Brookline, Mass.	708 00

Exhibit "B" to Petition

Form 355-J, 1922 Revision

Foreign Business Corporation

The Commonwealth of Massachusetts

Department of Corporations and Taxation

Division of Corporations

Room 237 State House

Duplicate Bill

Received payment. Paid 6-29-23. H. F. Long. 2.

Boston, September 20, 1922.

To Alpha Portland Cement Company, J. J. Matthes, Treas., First National Bank Bldg., Easton, Pa., 58.9:

Your excise due The Commonwealth of Massachusetts, in accordance with the provisions of Chapter 63, General Laws, and Acts in Amendment thereof and in Addition thereto, is as follows:

Corporate Excess (April 1, 1922), $75,932.08 Taxable at $5 per $1,000		$379 66
Net Income $9,202.53, Taxable at 2½ per cent	$230 06	
Less 5 per cent of Dividends Paid Massachusetts Inhabitants	$42 15	
		187 91
Minimum Tax		.....
Penalties for late filing of return		.....
Total Amount of Tax Due		$567 57
Abated		$.....
Net Tax		.....
Interest		$22 97
Costs		.....
Amount Paid		$590 54

1922.

[fol. 23] Send this bill with check payable to the Commonwealth of Massachusetts to the treasurer of the Commonwealth, room 227, State house, Boston, Mass.

Notice is hereby given that the above amount will be due and payable, at the Treasurer's Office, Room 227, State House, thirty days from date hereof. Application for abatement of correction of tax may be made to the Commissioner within thirty days from the date of this notice. To avoid interest the tax should be paid when due. Six per cent interest will be charged if tax is not paid when due; 12 per cent if payment is delayed until proceedings are commenced.

Treasurer's office hours, 9 a. m. to 2 p. m.; Saturdays, 9 a. m. to 12 m.

Payment of this tax received through Attorney General's office.

Henry F. Long, Commissioner.

EXHIBIT "C" TO PETITION

The Commonwealth of Massachusetts

Department of Corporations and Taxation

Division of Corporations

Harold S. Lyon, Director. Henry F. Long, Commissioner

237 State House, Boston, September 26, 1922.

Porter & Taylor, Counsellors at Law, 30 Broad Street, New York.

Alpha Portland Cement Company

GENTLEMEN: In reply to your inquiry as to the method of assessing and computing the Excise Tax upon the above-named corporation, the following statement is submitted.

That portion of the tax which relates to corporate excess was determined as follows:

The fair cash value of all the shares constituting the capital stock was ascertained by the Commissioner to be			$16,352,162
Assets employed in Massachusetts	$99,400		
Total assets employed	$21,406,098	X share =	75,352 08

From this value there was deducted:

Equity in real estate within the Commonwealth	$	
Machinery within the Commonwealth		
Securities deductible		
Corporate excess		$75,932 08
Tax at $5 per $1,000		379 66

[fol. 24] That portion of the tax which relates to income was determined as follows:

Net income attributable to Massachusetts	$9,202 53
Tax at 2½%	230 06
Less 5% of Dividends paid Massachusetts inhabitants	42 15
Net tax due	$187 91

Respectfully yours, Henry F. Long, Commissioner, by Harold S. Lyon, Director.

IN SUPREME JUDICIAL COURT

ANSWER

The respondent, Commonwealth of Massachusetts, for answer to the petition in the above cause, says as follows:

1. The respondent admits that the petitioner is a foreign corporation organized and existing under and by virtue of the laws of the State of New Jersey. It is ignorant as to the extent to which the petitioner is engaged in interstate commerce throughout the United States, and leaves the petitioner to prove the same so far as material. It admits that the petitioner maintains an office in the city of Boston in this Commonwealth. It denies that said office is used exclusively for conducting interstate commerce, and says that said office is a usual place of business of the petitioner.

2. The respondent admits that the petitioner, by salesmen engaged by it, solicits orders from customers resident in Massachusetts and neighboring states and that it transmits such orders from its office in Massachusetts to its office at Easton in the Commonwealth of Pennsylania. The respondent denies that the petitioner's activities within the Commonwealth of Massachusetts are exclusively confined to such solicitation and transmission, that the petitioner has confined its operations within this Commonwealth to the solicitation and execution of orders, that all said orders are accepted or rejected at Easton in the Commonwealth of Pennsylvania, and that acceptance of all orders takes place outside Massachusetts. The respondent is [fol. 25] ignorant as to the purpose for which the petitioner entered this Commonwealth, and leaves the petitioner to prove the same, if material. It denies all other allegations contained in paragraph 2 of the petition.

3. The respondent admits that the business of the petitioner consists of the manufacture and sale of cement, that the business here is conducted by employees, and that the business here is conducted as admitted by paragraph 2 of this answer. In denies all other allegations of paragraph 3 of the petition.

Further answering, the respondent says that the petitioner has property located in Massachusetts, ships merchandise to residents of Massachusetts, solicits and negotiates sales from its place of business and elsewhere in Massachusetts, conducts correspondence and pays expenses at said place of business, and performs and carries on in this Commonwealth divers other functions and activities incident to its business of manufacturing and selling cement.

4. The respondent admits that the petitioner on or about May 6, 1922, filed under a protest a return for the year 1922 in substantially the form set forth in Exhibit A annexed to the petition. The respondent denies each and every other material allegation of paragraph 4 of the petition.

5. The respondent admits that on or about September 20, 1922, the Commissioner of Corporations and Taxation assessed against the petitioner, under the provisions of G. L., c. 63, and acts in amendment thereof and in addition thereto, an excise for the year 1922, in the sum of Five hundred sixty-five and 57/100 (565.57) dollars; that said assessment was based upon information contained in said return (as well as upon other available information); that the Commissioner duly notified the petitioner of said assessment; and that Exhibit B annexed to the petition is a substantially accurate copy of said notification. The respondent denies each and every other material allegation of paragraph 5 of the petition.

6. The respondent admits, if material, that a letter was sent by the Commissioner of Corporations and Taxation to Messrs. Porter & Ttaylor on or about September 26, 1922, as alleged in paragraph 6 of the petition.

7. In answer to paragraph 7 of the petition the respondent says as follows:

In accordance with the provisions of Gen. St. 1919, c. 355, § 22, (G. L., c. 63, § 47,) the Commissioner of Corporations and Taxation made and published the following general ruling:

[fol. 26] "2505. Ordinarily, such proportion of an intangible asset employed in business will be deemed to be employed in business within Massachusetts as that portion of the remainder of income allocable in Massachusetts under the provisions of section 19 of the act bears to the total of said remainder. If, however, because of the peculiar circumstances of any particular case such method of apportionment does not fairly reflect the proportion of an asset employed in business in Massachusetts, the corporation may submit its reasons for requesting determination by another method. The department also reserves the right in such cases to make the apportionment by another rule, even though the corporation does not request determination by another method; but in such event the corporation will be notified."

The petitioner filed its return unaccompanied by any request for a determination by any other than the method set forth in ruling No. 2505, nor was any such request thereafter submitted to the Commissioner, either prior to or after assessment of the excise.

Pursuant to ruling No. 2505 and the provisions of G. L., c. 63, and upon the basis of the information furnished by said return, the Commissioner determined the value of the corporate excess of the petitioner employed within the Commonwealth in the following manner, to wit:

The portion of the remainder of income allocable to Massachusetts under the provisions of G. L., c. 63, § 41, (Gen. St. 1919, c. 355, § 19,) was shown by said return to amount to $9,902.53, (Schedule D, item 15). The total of said remainder was shown by said return to amount to $707,577.98, (Shedule D, items 5 and 10). The intangible assets employed in business were shown to consist of the following items (Schedule C, Table A):

Bank deposits and accounts receivable	$827,469.98
Good will	1,750,000.00
Other intangible assets	5,084,620.23
Total	$7,662,090.21

Using these figures for the purpose of determining the proportion in accordance with said ruling No. 2505, but erroneously taking the figures $7,602,090.21, instead of $7,662,090.21, as the figure representing the total of intangible assets, the Commissioner, by the following computation, to wit: $\frac{9,203}{707,578} \times 7,602,090.21 = 98,827.17$, determined $98,827.17 to be the value of the intangible assets em- [fol. 27] ployed in business within the Commonwealth. Adding to this figure the value of the tangible assets employed in business in Massachusetts, shown by said return to amount to $573.00 (Schedule C. table A), the Commissioner determined the total value of all assets of the petitioner employed in business in Massachusetts to be $99,400.00.

Pursuant to the provisions of G. L., c. 63, § 30, par. 4, the Commissioner determined the fair cash value of all the shares constituting capital stock on April 1, 1922, to be $16,352,162.00. He determined the value of the total assets of the corporation to be $21,406,098.00, as shown by said return (Schedule C, Table IV). The Commissioner then, having found that the value of the assets employed in business within the Commonwealth was $99,400.00, as herein above stated, determined the value of the corporate excess employed within the Commonwealth, according to the rule provided by G. L., c. 63, § 30, par. 4, to be $75,932.08, the computation being as follows, to wit: $\frac{99,400}{21,406,098} \times 16,352,162 = \$75,932.08$

The amount of the tax on said corporate excess, at the rate of five dollars per thousand, the Commissioner determined to be $379.36.

No application for abatement of the excise assessed to the petitioner, pursuant to G. L., c. 63, § 51, was seasonably filed by the petitioner.

Except as herein admitted, the respondent denies each and every material allegation of paragraph 7 of the petition.

8. The respondent admits that the petitioner paid to the Commonwealth the sum of $567.57, with interest thereon in the sum of $22.97, amounting to a total of $590.54. It says that payment was made on or about June 30, 1923, and not on or about June 23, 1923, as alleged. The respondent denies each and every material allegation of paragraph 8 of the petition, except as herein expressly admitted.

9. The respondent denies the allegations of paragraph 9 of the petition.

10. Further answering, the respondent says that on November 30, 1921, the petitioner herein filed its petition against the Commonwealth of Massachusetts, respondent herein, for the recovery of taxes

for the year 1921 claimed to have been illegally assessed, for the reasons set forth in said petition as follows:

"(a) The imposition of the said tax against your petitioner is in violation of the Constitution of the United States in that your petitioner is denied the rights and privileges assured to it therein and in that the said tax so assessed against your petitioner is a direct [fol. 28] burden on interstate commerce and constitutes an unlawful regulation of interstate commerce in contravention of the commerce clause embodied in section 8 of article I of the Constitution of the United States.

(b) That the said tax so assessed against your petitioner by the Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts is in violation of the Federal Constitution in that it levies a tax upon property of your petitioner situated without the limits of the Commonwealth of Massachusetts, thereby depriving your petitioner of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

(c) Your petitioner draws in question the validity of said chapter 63 of the General Laws and chapters 361 and 493 of the Acts of 1921 and Acts in amendment thereof, on the ground that said statutes are repugnant to the Constitution of the United States in that they levy a tax which is a direct burden on interstate commerce and constitutes an unlawful regulation of interstate commerce in contravention of the commerce clause embodied in section 8 of article I of the Constitution of the United States.

(d) Your petitioner draws in question the validity of said chapter 63 of the General Laws and chapters 361 and 493 of the Acts of 1921 and Acts in amendment thereof, on the ground that said statutes are repugnant to the Constitution of the United States in that they levy a tax against property of your petitioner situated without the limits of the Commonwealth of Massachusetts, thereby depriving your petitioner of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States."

The respondent further says that in said cause an anwer was filed denying the allegations hereinabove quoted, that the issues thereby raised were all determined favorably to te respondent, and that a final decree therein has been entered after rescript from the Full Court dismissing the petition with costs to the petitioner. The respondent says that the petitioner is thereby concluded as to the issues hereinabove set forth.

Commonwealth of Massachusetts, by Alexander Lincoln, Assistant Attorney General.

Filed September 12, 1923.

[fol. 29] IN SUPREME JUDICIAL COURT

AGREED STATEMENT OF FACTS

In the above cause it is hereby agreed that the facts hereinafter stated, so far as competent, relevant and material, shall be taken as true; and the court may draw inferences from the facts herein stated.

1. The petitioner, Alpha Portland Cement Company, is a corporation organized and existing under the laws of the State of New Jersey. Its principal office is located at Easton, Pennsylvania. The petitioner is engaged in the manufacture and sale of cement, and has mills located in the States of New York, Pennsylvania, New Jersey, West Virginia, Ohio, Illinois and Michigan. Cement packed in sacks, bags or barrels is shipped from these mills to various points in the United States and foreign countries, both by rail and water.

2. The petitioner's activities within the Commonwealth of Massachusetts are as follows: It leases two rooms in the Board of Trade Building, situated at State, Broad, Central and India Streets, in the city of Boston, which is the only office of the petitioner in Massachusetts. The said office is in charge of a district sales manager, the only other employee therein being a clerk. This clerk is a stenographer and typist, and as such writes such letters as are sent out from the Boston office. He makes up the orders that are turned in at the Boston office, as explained herein, on certain forms which the company has for its business, and encloses them in an envelope addressed to the Eastern office, where they are accepted or rejected. He keeps a record of shipments into the New England territory. He receives from Easton copies of all the invoices covering materials shipped to any customer in the New England states and enters them on a card of record, and periodically turns this information over to salesmen in whose territory shipments have been made. He of course looks after such additional duties as are consistent with any office. The office is used as headquarters by traveling salesmen employed by petitioner, who are four in number, including the district sales manager, who himself travels. These salesmen solicit orders in the Commonwealth of Massachusetts and in other New England states for cement manufactured by petitioner. Orders taken by the salesmen are turned in at said sales office, and are then forwarded by mail to the principal office of the company at Easton, Pennsylvania. When the orders so forwarded reach the principal office they are either accepted or rejected. If accepted, the merchandise [fol. 30] called for is shipped from the petitioner's mills, located at Martins Creek, Pennsylvania, or Alsen, New York, direct to the customer. When shipment is made, invoices are prepared at the principal office at Easton, Pennsylvania, and mailed directly to the customer. The invoices contain a direction that funds in payment be sent directly to the principal office. In substantially all cases the orders are taken by the salesmen upon personal solicitation at the customer's place of business, but there are also a few instances in

which the customer forwards the order by mail to the Boston office, and a few very exceptional cases where a customer gives an order at the Boston office. In every case, however, the orders are forwarded to the principal office at Easton, Pennsylvania, for acceptance or rejection. In no case and under no circumstances are any orders accepted or rejected by the Boston office. Funds in payment for the merchandise shipped are sent by the customer to the principal office at Easton, Pennsylvania, as above stated; but in cases of delinquent accounts or bad credit risks, the credit department at Easton, in approving the contract, sometimes sends word to the salesman that such an order would only be shipped upon receipt of check in advance. In that case the salesman calls again on the customer and explains the situation, and in some instances receives a check. The salesman sends it first to the Boston office, from where it is transmitted to the main office at Easton; or, if there is any hurry, the salesman sends the check directly to Easton. In no case is the check made payable to salesmen, but is always payable to the Alpha Portland Cement Company, and is deposited by it at its Easton office. In case of some overdue accounts, salesmen are sometimes authorized to request and receive payment. The latter cases are comparatively rare, and are exceptions to the ordinary course of business: but when funds are so collected by salesmen they are forwarded to the principal office at Easton, Pennsylvania.

3. No merchandise is kept in the said sales office in sample form or otherwise, nor in any part of the Commonwealth of Massachusetts. None of the merchandise sold to customers is produced or purchased in Massachusetts, all of it being produced in the petitioner's mills at Alsen, New York, or Martins Creek, Pennsylvania, and shipped from one of the said mills to the customer. No shipments are made from one point in Massachusetts to another point in that Commonwealth, nor from a point in Massachusetts to a point outside of that Commonwealth. The only tangible property owned by petitioner [fol. 31] in the Commonwealth of Massachusetts, real or personal, is the office furniture in the sales office, valued at about $500 Of the intangible assets there are none having a situs in Massachusetts for purposes of property taxation except in so far as the corporate franchise employed within the boundaries of the Commonwealth in transactions in interstate comerce as herein set forth and credits arising from the sale of cement to residents of Massachusetts may be considered as having such situs. No bank account is kept in Massachusetts. The salesmen's salaries any office rent are sent directly from the principal office at Easton, Pennsylvania. Incidental expenses in Massachusetts are paid from an account kept by the district sales manager in his own name, which does not exceed $1,000. Stockholders', directors' or other corporate meetings have never been held in Massachusetts, and no officer or agent of petitioner has an office there except the district sales manager's office, above specified. No books or records are kept in Massachusetts except as above noted.

4. On May 6, 1922, the petitioner filed, under protest, an excise tax return for the year 1922, with schedules and other papers an-

nexed thereto. Copies of said return, schedules and papers are annexed to the petition as Exhibit A, and are made a part of this agreed statement of facts.

5. On September 20, 1922, the Commissioner of Corporations and Taxation assessed against the petitioner, under the provisions of G. L., c. 63, and acts in amendment thereof and in addition thereto, an excise for the year 1922 in the sum of $567.57. The Commissioner duly notified the petitioner of said assessment. A copy of such notification is annexed to the petition as Exhibit B, and is made a part of this agreed statement of facts.

6. In accordance with the provisions of Gen. St. 1919, c. 355, § 22, re-enacted as G. L., c. 63, § 47, the Commissioner of Corporations and Taxation in May, 1920, made and published the following general ruling, which has never been repealed and has since continuously been in force:

"2505. Ordinarily, such proportion of an intangible assets employed in business will be deemed to be employed in business within Massachusetts as that portion of the remainder of income allocable in Massachusets under the provisions of section 19 of the act bears to the total of said remainder. If, however, because of the peculiar circumstances of any particular case such method of apportionment does not fairly reflect the proportion of an asset employed in business in Massachusetts, the corporation may submit its reasons for requesting determination by another method. The department also [fol. 32] reserves the right in such cases to make the apportionment by another rule, even though the corporation does not request determination by another method; but in such event the corporation will be notified."

The petitioner filed its return unaccompanied by any request for a determination by any other than the method set forth in ruling No. 2505, nor was any such request thereafter submitted to the Commissioner, either prior to or after assessment of the excise.

Pursuant to ruling No. 2505 and the provisions of G. L., c. 63, and upon the basis of the information furnished by said return, the Commissioner determined the value of the corporate excess of the petitioner employed within the Commonwealth in the following manner, to wit:

The portion of the remainder of income allocable to Massachusetts under the provisions of G. L., c. 63, § 41, (Gen. St. 1919, c. 355, § 19) was shown by said return to amount to $9,202.53 (Schedule D, item 15). The total of said remainder was shown by said return to amount to $707,577.98 (Schedule D, items 5 and 10). The intangible assets employed in business were shown to consist of the following items (Schedule C, Table A):

Bank deposits and accounts receivable	$827,469.98
Good will	1,750,000.00
Other intangible assets	5,084,620.23
Total	$7,662,090.21

Using these figures for the purpose of determining the proportion in accordance with said ruling No. 2505, but inadvertently taking the figures $7,602,090.21, instead of $7,602,090.21, as the figure representing the total of intangible assets, the Commissioner, by the following computation, to wit: $\frac{9,203}{707,578} \times 7,602,090.21 = 98,827.17$, determined $98,827.17 to be the value of the intangible assets employed in business within the Commonwealth. Adding to this figure the value of the tangible assets employed in business in Massachusetts, shown by said return to amount to $573.00 (Schedule C, Table A), the Commissioner determined the total value of all assets of the petitioner employed in business in Massachusetts to be $99,400.00.

Pursuant to the provisions of G. L., c. 63, § 30, par. 4, the Commissioner determined the fair cash value of all the shares constituting capital stock on April 1, 1922, to be $16,352,162.00. He determined the value of the total assets of the corporation to be $21,[fol. 33] 406,098.00, as shown by said return (Schedule C, Table IV). The Commissioner then, having found that the value of the assets employed in business within the Commonwealth was $99,400.00, as herein above stated, determined the value of the corporate excess employed within the Commonwealth, according to the rule provided by G. L., c. 63, § 30, par. 4, to be $75,932.08, the computation being as follows, to wit: $\frac{99,400}{21,406,098} \times 16,352,162 = \$75,932.08$.

The amount of the tax on said corporate excess, at the rate of five dollars per thousand, the Commissioner determined to be $379.66.

In accordance with the provisions of G. L., c. 63, and acts in amendment thereof and in addition thereto, the Commissioner determined the amount of the tax on net income derived from business carried on within the Commonwealth to be $187.91, making the total excise $567.57, as herein above stated.

No application for abatement of the excise assessed to the petitioner, pursuant to G. L., c. 63, § 51, was seasonably filed by the petitioner.

7. On September 26, 1922, the Commissioner of Corporations and Taxation sent a letter to the petitioner's attorneys, Messrs. Porter and Taylor. A copy of said letter is annexed to the petition as Exhibit C, and is made a part of this agreed statement of facts.

8. On June 30, 1923, the petitioner paid to the Commonwealth, under protest, the sum of $590.54, of which $567.57 was in payment of the total amount of the tax due, and the balance of $22.97 was in payment of interest thereon.

9. No question is made for the purposes of this case but that the mathematical computations of the Commissioner were correct, and that in so far as the assessment of the tax here in question depended

upon or involved a valuation of specific items of assets in assessing the tax as herein set forth, the valuation of said specific items was fair.

10. Pursuant to G. L., c. 63, § 77, the petitioner filed its petition for the recovery of the tax so paid within six months from the date of payment.

11. On November 30, 1921, the Alpha Portland Cement Company, the petitioner herein, filed a petition against the Commonwealth of Massachusetts, respondent herein, for the recovery of taxes for the year 1921, claimed to have been illegally assessed. Thereafter, [fols. 34–86] the respondent filed an answer to the petition and an agreed statement of facts was executed and filed by the parties. The case thus presented was reserved for the consideration and determination of the Full Court, and was heard by said court, and the court ordered the petition dismissed with costs. A final decree dismissing the petition, with costs to the respondent, was thereupon entered prior to the filing of the petition herein. A writ of error from the Supreme Court of the United States was allowed, and bond on writ of error approved, by the Chief Justice of this court and said writ of error was entered in the Supreme Court of the United States on June 29, 1923. Copies of the petition, answer, agreed statement of facts, reservation, opinion and rescript of the Full Court, final decree and papers on writ of error are hereto annexed and made a part of this agreed statement of facts.

Warner, Stackpole & Bradlee, Attorneys for Petitioner. Alexander Lincoln, Assistant Attorney General.

Filed October 3, 1923.

[fol. 87] IN SUPREME JUDICIAL COURT

FINAL DECREE—Filed Oct. 5, 1923

This cause came on to be heard upon the petition, answer and an agreed statement of facts, and thereupon, in consideration thereof, it is

Ordered, adjudged and decreed that the petition be dismissed.

By the Court.

John F. Cronin, Clerk.

[fol. 88] IN SUPREME JUDICIAL COURT

NOTE OF APPEAL TO FULL BENCH—Filed Oct. 5, 1923

Now comes the petitioner in the above entitled cause and appeals to the full bench of the Supreme Judicial Court from the final decree, dismissing the petition entered October 5, 1923.

By its attorneys, Warner, Stackpole & Bradlee. E. A. M.

[File endorsement omitted.]

[fol. 89] In Supreme Judicial Court of Massachusetts

[Title omitted]

Rescript from Full Bench—Filed Feb. 28, 1924

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz: Petition dismissed with costs.

By the court.

Walter F. Frederick, Clerk.

[File endorsement omitted.]

[fol. 89½] Brief Statement of the Grounds and Reasons of the Decision

The reasons of the decision are set forth at length in the opinion filed with the reporter of decisions, to which reference is made.

[File endorsement omitted.]

[fol. 90] In Supreme Judicial Court

[Title omitted]

Final Decree on Rescript—Filed March 7, 1924

The above entitled cause came on to be further heard after rescript from the Full Court, and upon consideration thereof it is

Ordered, adjudged, and decreed that the petition be and it hereby is dismissed with costs to the respondent taxed in the sum of thirty-eight dollars and sixteen cents ($38.16), and execution issue therefor.

By the Court.

John F. Cronin, Clerk.

March 7, 1924.

Certificate to foregoing paper omitted in printing.

[fol. 91] [File endorsement omitted.]

[fol. 92] IN SUPREME JUDICIAL COURT

CLERK'S CERTIFICATE

All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said Court to be hereto affixed.

Witness Arthur P. Rugg, Esquire, Chief Justice of our said Supreme Judicial Court, at Boston, this fourteenth day of March in the year of our Lord one thousand nine hundred and twenty-four.

John F. Cronin, Clerk. (Seal.)

[fol. 93] IN SUPREME JUDICIAL COURT

[Title omitted]

OPINION—Filed March 4, 1924

Present: Rugg, C. J., Braley, Pierce, & Carroll, JJ.

RUGG, C. J.:

This is a petition under G. L. c. 63, §77, to recover an excise alleged to have been extracted from the petitioner illegally for the year 1922. This section of the statute enables a corporation to bring before this court the inquiry whether there has been a wrongful assessment of a tax or excise upon that which was not the proper subject of taxation. A corporation cannot by petition under this section cause inquiry to be made whether there has been an overvaluation of that which is rightly subject to the tax or excise, relief for wrong of that nature being afforded by G. L. c. 63, §§51, 71. Boston Manuf. Co. v. Commonwealth, 144 Mass. 598. Attorney General v. East Boston Land Co. 222 Mass. 24.

The petitioner is a corporation organized under the laws of New Jersey, engaged in business in this Commonwealth. Its only tangible property within this Commonwealth is office furniture of a value of $573. It conducts within this Commonwealth, in the sale and delivery of cement and the maintenance of a sales force, an extensive business exclusively interstate in character. Its nature and extent are described in Alpha Portland Cement Co. v. Commonwealth, 244 Mass. 530, in substantially the same general terms as shown on this record and need not now be repeated.

[fol. 94] The excise here assailed was levied under the provisions of G. L. c. 63, §§30-43, both inclusive, § 52, and St. 1921, c. 361. All these sections are printed in 244 Mass. 532-543, and need not here be recited. It is provided by G. L. c. 63, §47, that the commissioner of corporations and taxation "shall make from time to time such

reasonable rules and regulations, consistent with sections thirty to fifty-one, inclusive, as he may deem necessary for carrying out their provisions." Pursuant to that mandate the commissioner made a general ruling of the following tenor: "2505 Ordinarily, such proportion of an intangible asset employed in business will be deemed to be employed in business within Massachusetts as that portion of the remainder of income allocable in Massachusetts under the provisions of section 19 of the act bears to the total of said remainder. If, however, because of the peculiar circumstances of any particular case such method of apportionment does not fairly reflect the proportion of an asset employed in business in Massachusetts, the corporation may submit its reasons for requesting determination by another method. The department also reserves the right in such cases to make the apportionment by another rule, even though the corporation does not request determination by another method; but in such event the corporation will be notified." The petitioner filed its return and made no request for determination by any other method. So far as this method affects valuation, it is not open to inquiry in this proceeding. The remedy for a wrong of that nature would be under §§51, 71.

This statute in its application to the present petitioner was considered at length in Alpha Portland Cement Co. v. Commonwealth, 244 Mass. 530. The purpose of bringing the present petition respecting the excise levied for the year succeeding that under investigation in the earlier case apparently is to make certain the view of this court as to points thought by the petitioner not to have been fully developed there, in order that the Supreme Court of the United States on writ of review may have before it all aspects of the statute.

The method of calculation of the excise is set out with greater de- [fol. 95] tail in the present than in the earlier record. The basis of the excise is the value of the corporate excess employed within the Commonwealth and the net income derived from business within the Commonwealth. Thus the express terms of the statute confine its operation and effect to property located and net income earned within the Commonwealth. Without pursuing the details of the method of computation to ascertain these two elements, it is enough to say that it is in conformity to the statute. This conclusion finds confirmation in the fact that the petitioner failed to exercise the option, extended to it by the ruling of the commissioner already quoted, of requesting an apportionment by some other method.

The petitioner founds its objections to the statute on no narrow ground. The only contention now urged by it stated broadly is that the tax is illegal and in violation of its rights under the federal Constitution. That contention is understood to mean that, as matter of constitutional right, the only factor capable of being used to ascertain the excise due from it is the tangible personal property owned by it and located in this Commonwealth, that is to say, its office furniture worth $573. It is said in the brief of the learned counsel for the petitioner: "In the former case it was stipulated that the amount of the tax assessed was not questioned, and while in the

court's opinion reference was made to the petitioner's intangible assets, the extent to which the valuation of corporate excess consisted of a valuation of these intangible assets arising solely from the conduct of interstate commerce did not appear. If in the former case the court intended to construe the statute as including as assets employed in business within the Commonwealth these intangibles constituting a part of and arising exclusively from the conduct of interstate commerce, why that is of course the end of this case."

The former decision rested in its ultimate analysis upon the theory that under the statute the excise might be measured in part upon intangible assets of the petitioner having a situs in this Commonwealth and arising exclusively from the conduct of its interstate [fol. 96] business. We understand that credits due from residents within this Commonwealth to nonresidents may be made the subject of direct property taxation here. Metropolitan Life Ins. Co. of New York v. New Orleans, 205 U. S. 395. Liverpool & London & Globe Ins. Co. v. Orleans Assessors, 221 U. S. 346. Board of Assessors v. Comptoir National D'Escompte, 191 U. S. 388. Shaffer v. Carter, 252 U. S. 37, and cases there reviewed. The source from which such credits arise is not material. They are not immune from taxation because coming into existence though the transaction of interstate commerce. That being so, it would seem that such credits may be used as a measure of an excise levied indifferently upon all corporations under a general law.

The case at bar appears to us to be governed in every essential particular by the authority of Alpha Portland Cement Co. v. Commonwealth, 244 Mass. 530, and the decisions there collected and reviewed. Its reasoning is adopted without discussion as decisive of the case at bar.

Petition dismissed with costs.

J. G. Palfrey, L. H. Porter & H. Twombly, for the petitioner.

J. R. Benton, Attorney General, & A. Lincoln, Assistant Attorney General, for the Commonwealth.

[fol. 97] Certificate to foregoing paper omitted in printing.

[fol. 98] IN SUPREME JUDICIAL COURT

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed March 12, 1924

Now comes the Alpha Portland Cement Company, and says that on the 7th day of March, 1924, the Supreme Judicial Court, within the County of Suffolk, and Commonwealth of Massachusetts, entered final judgment herein in favor of the above named respondent and against the above named petitioner, in which judgment and the proceedings had prior thereto in said cause certain errors were committed to the prejudice of the above named petitioner, all of which appear in the assignment of errors which is filed with this petition.

Wherefore, the undersigned corporation, being the petitioner aforesaid, prays that a writ of error may be issued in its behalf out of the Supreme Court of the United States to the end that the errors so complained of may be corrected and the said judgment reversed, and that [fol. 99] a transcript of the record, proceedings and papers in this suit, duly authenticated, may be sent to the Supreme Court of the United States.

Alpha Portland Cement Company, by Louis H. Porter, F. Carroll Taylor, John G. Palfrey, Its Solicitors.

Certificate to foregoing paper omitted in printing.

[fol. 100] IN SUPREME JUDICIAL COURT.

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes the Alpha Portland Cement Company, your petitioner in the above entitled cause, being the plaintiff-in-error herein, and with its petition for a writ of error makes and files the following assignment of errors, and says that there is manifest error in the records and proceedings in the above entitled cause, and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignment of errors:

(1) The Massachusetts Supreme Judicial Court erred in holding that the provisions of the Massachusetts Excise Tax on foreign corporations, as contained in Chapter 63 of the General Laws of the Commonwealth of Massachusetts, and the acts in amendment thereof and in addition thereto, and Chapter 361 and Chapter 493 of the Massachusetts Act of 1921, as applied to the plaintiff-in-error were [fol. 101] constitutional and not in violation of the provisions of the Commerce Clause contained in Section VIII, Article I of the Constitution of the United States, as placing a burden or tax on interstate commerce equivalent to a regulation thereof.

(2) The Court erred in holding that the provisions of the said Massachusetts Excise Tax on foreign corporations, construed to impose an excise tax upon a foreign corporation engaged exclusively in interstate commerce, for the privilege of maintaining a means of such commerce, and as so construed as applied to the plaintiff-in-error, were constitutional and were not in violation of the provisions of the Commerce Clause contained in Article I, Section VIII of the Constitution of the United States, as placing a burden or tax on interstate commerce equivalent to a regulation thereof.

(3) The Court erred in holding that the provisions of the said Massachusetts Excise Tax on foreign corporations, construed to impose a tax upon a foreign corporation engaged exclusively in inter-

state commerce, and construed as in substance a tax on credits arising exclusively in said interstate commerce, and as so construed as applied to the plaintiff-in-error, were constitutional and were not in violation of the provisions of the Commerce Clause contained in Article I of Section VIII of the Constitution of the United States, as placing a burden or tax on interstate commerce equivalent to a [fol. 101½] regulation thereof.

(4) The Court erred in holding that the provisions of the said Massachusetts Excise Tax on foreign corporations, construed to impose a tax upon a foreign corporation engaged exclusively in interstate commerce, and construed to be imposed in part upon income derived exclusively from interstate commerce, and as so construed as applied to the plaintiff-in-error, were constitutional and were not in violation of the provisions of the Commerce Clause contained in Article I, Section VIII of the Constitution of the United States, as placing a burden or tax on interstate commerce equivalent to a regulation thereof.

(5) The Court erred in holding that the provisions of the said Massachusetts Excise Tax on foreign corporations as applied to the plaintiff-in-error, are constitutional and not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States as depriving the petitioner of its property without due process of law, and denying the petitioner the equal protection of law, in that said statute imposes a tax on income of the business and sales made outside the said Commonwealth, and upon property located without said Commonwealth.

(6) The Court erred in holding that the provisions of the said Massachusetts Excise Tax on foreign corporations construed to in- [fol. 102] clude as assets in Massachusetts and subject to tax therein credits belonging to a foreign corporation exclusively engaged in interstate commerce, said credits arising exclusively from said interstate commerce, and also other intangibles consisting of stock in other foreign corporations owning no property in Massachusetts and not doing any business therein, and as so construed as applied to the plaintiff-in-error, are constitutional and not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, as depriving the petitioner of its property without due process of law, and denying the petitioner the equal protection of law.

(7) The Court erred in holding that the provisions of the said Massachusetts Excise Tax on foreign corporations, construed to impose a tax on a portion of the income of a foreign corporation engaged exclusively in interstate commerce, said portion being determined largely by an allocation to Massachusetts of stock in other foreign corporations owning no property in Massachusetts and doing no business therein, and of other intangibles not located in or connected with Massachusetts, and as so construed as applied to the plaintiff-in-error, are constitutional and not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Con-

stitution of the United States, as depriving the petitioner of its property without due process of law and denying the petitioner the [fol. 102½] equal protection of law.

For which errors the said plaintiff-in-error, the Alpha Portland Cement Company, prays that the judgment of the said Supreme Judicial Court for the Commonwealth of Massachusetts be reversed, and judgment entered for the plaintiff-in-error, and for costs.

Alpha Portland Cement Company, by Louis H. Porter, F. Carroll Taylor, John G. Palfrey, its Solicitors.

[fols. 103 & 104] Bond on Writ of Error for $500—Approved and filed March 12, 1924; omitted in printing

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[fol. 105] Citation—In usual form, showing service on Alexander Lincoln; omitted in printing

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[fol. 106] In Supreme Judicial Court

Clerk's Certificate

I, John F. Cronin, Clerk of the Supreme Judicial Court within and for the County of Suffolk and Commonwealth of Massachusetts, do hereby certify that the papers hereto annexed are an exemplification of the record in the case of Alpha Portland Cement Co., Petitioner, vs. Commonwealth of Massachusetts, Respondent, in said Supreme Judicial Court determined; and attached thereto, and transmitted with said record, are a copy of the Opinion of the Supreme Judicial Court for the Commonwealth, attested by the Reporter of Decisions; a copy of the Application for Writ of Error; a copy of the Assignment of Errors; a copy of the Bond; and the original Citation with acceptance of service endorsed thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Boston this 14th day of March in the year of our Lord one thousand nine hundred and twenty-four.

John F. Cronin, Clerk. (Seal.)

[fol. 107] In Supreme Court of the United States

[Title omitted]

Stipulation as to Printing of Record—Filed April 17, 1924

It is hereby stipulated that the copy of the record of the first case between the parties hereto, State Court No. 35433, and Docket No. 402 of the October Term, 1923, of the Supreme Court of the United States, printed in full as an exhibit in the record herein in the State

Court at pages 32 to 85 inclusive, need not be printed in extenso in the record on the writ of error in the Supreme Court of the United States in this case; but that in place thereof there be printed the following statement, to wit:

"A complete copy of the record in the Supreme Court of the United States, Docket No. 402, October Term, 1923, Alpha Portland Cement Company, plaintiff-in-error, against Commonwealth of Massachusetts, defendant-in-error, was included in the record in the State Court; and as this case has been consolidated for hearing with Case 402, the said record is not here reprinted."

Dated March 31, 1924.

Louis H. Porter, Counsel for Plaintiff-in-Error. Alexander Lincoln, Assistant Attorney General.

[fol. 108] [File endorsement omitted.]

Endorsed on cover: File No. 30,198. Massachusetts Supreme Judicial Court. Term No. 327. Alpha Portland Cement Company, plaintiff in error, vs. Commonwealth of Massachusetts. Filed March 17th, 1924. File No. 30,198.